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LIABILITY FOR NEGLIGENT INJURY TO A PERSON GIVEN FREE TRANSPORTATION IN VIOLATION OF LAW.—The question as to what is the duty of a common carrier toward a person accepting free transportation in violation of law came before the supreme court of Michigan in the recent case of *Van Auken v. Michigan Central Railroad Company* (Mich., 1914), 148 N. W. 819. Decedent was employed by a lumber company to load logs on cars at the end of a branch of the defendant's railroad. For several years he and others so employed had been permitted to ride on logging trains from the end of the branch to the main line without signing a release or paying fare. While so riding he was killed by a log, the front end of which had fallen from a moving car, caught on the ground and forced the other end through the "caboose" in which decedent was seated. The defendant had filed schedules for half-fare rates over this branch and ordinarily required regular passengers to sign agreements purporting to release the defendant from liability to persons accepting transportation over the branch line. A statute in Michigan prohibits free transportation of persons on railroads, and makes a violation of the statute a misdemeanor on the part of the carrier and the person accepting free transportation. The court held that the decedent was not a passenger but a mere licensee, to whom the defendant owed no duty other than to refrain from wantonly doing him injury, even though he thought that he was entitled to ride by virtue of an agreement between the defendant and his employer.

In considering the effect upon the liability of the carrier for negligent injury of a law expressly prohibiting free transportation of persons by a common carrier, the court says, "the statute absolutely prohibits the defendant from furnishing transportation except in compliance with the law. Had plaintiff's decedent complied with the lawful requirements" (of the carrier for signing a release) "for transportation over this branch, the terms of the contract would have prevented recovery. Can it be said that because he violated the law he is in a better position than if he complied therewith? We think not. The decedent was not a passenger but a mere licensee." No authority is cited for the above holding. It is difficult to see how it can logically be held that the contract or status of the decedent was affected by contracts signed by others.

It is submitted that the dissenting opinion is the better in holding that the fact that the passage was in violation of the statute prohibiting such free transportation could not affect the duty of the carrier toward the person whom it knowingly gave such passage. The late cases are uniform in holding that a common carrier transporting a person in violation of a statutory or constitutional provision cannot rely upon the invalidity of its contract to relieve itself from the consequences of a negligent injury to such person. *John v. Northern Pacific Ry. Co.*, 42 Mont. 18, 32 L. R. A. N. S., 85, 111 Pac. 632; *Schuyler v. Southern Pacific Co.*, 37 Utah 581, rehearing 37 Utah 612, 109 Pac. 1025; *So. Pac. Co. v. Schuyler*, 227 U. S. 601, 33 Sup. Ct. 227, 57 L. ed., 662, 43 L. R. A. N. S., 901; *McNeill v. Durham & C. R. Co.*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 230, reversing holding in same case 132 N. C. 510, 44 S. E. 341, 95 Am. St. Rep. 641, 67 L. R. A. 227; *Bradburn v. Whatcom*

Co., R. & L. Co., 45 Wash. 582, 88 Pac. 1020, 14 L. R. A. N. S. 526; *Gabbert v. Hackett*, 135 Wis. 86, 14 L. R. A. N. S., 1070, 115 N. W. 345.

Statutes of the sort mentioned either impose a penalty on the carrier for violation, or, as in the case of the Michigan statute, make both the carrier and the passenger guilty of a misdemeanor. *So. Pac. Co. v. Schuyler*, supra; *McNeill v. Durham*, supra. The statute in each case provides the penalty, and it is unnecessary, if not unreasonable, that the court supply another. It is more than questionable that legislatures in passing such statutes contemplate that a violation of the provisions thereof should deprive the passenger of his rights and free the carrier of its duty. The following quotation from *Southern Pacific Company v. Schuyler*, supra, is in point in this connection: "It is argued * * * that it was beyond the power of the state court to 'read into the Hepburn Act an exception in favor of gratuitous passengers.' * * * This is ingenious, but, as we think, unsound. * * * The act itself declares what penalty shall be imposed for a violation of its prohibition. * * * This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage."

It is generally held that the duty of the carrier is based, not on the contract of carriage, but upon considerations of public policy, and that such duty arises by implication of law. This is the doctrine pronounced in the case of *So. Pac. Co. v. Schuyler*, supra, where it is said: "His" (the passenger's) "right to safe carriage was not derived according to the law of Utah from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act" (in accepting free transportation). "It arose from the fact that he was a human being, of whose safety the plaintiff in error had taken the charge." Therefore, under this theory, it is not material to an inquiry into the duty of the carrier toward the passenger to consider what effect the statute has upon a contract of carriage made in violation of its provisions.

Moreover, the tenor of the decision in *Gabbert v. Hackett*, supra, seems to imply that the same rule would be applied if the duty of the carrier arises out of the contract. The court therein says that the great weight of authority appears to be that in order to establish the status of passenger it is necessary to show a valid contract relation between the carrier and the passenger. In support of its holding, however, the court cites cases which go upon the theory that the duty arises by implication of law upon considerations of public policy. The decision does not definitely state the basic theory upon which the conclusion is reached that the carrier is liable for negligence in cases of the kind under discussion.

H. H.